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No. 09-355

Supreme Court, U.S.
FILED
DEC 8 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARK TREESH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE KENTUCKY DEPARTMENT OF REVENUE, AND FRANKFORT INDEPENDENT SCHOOL DISTRICT, FRANKFORT, KENTUCKY,

Petitioners,

v.

DIRECTV, INC., AND ECHOSTAR SATELLITE, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

REPLY BRIEF

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PRELIMINARY STATEMENT[1]

Not only is the issue presented by this case important to Kentucky, as the Respondents concede, because it represents "roughly $70 million in taxes, interest, and penalties[,]" Resp. Br. 11, but also it is one of national importance because virtually all other States are now struggling to find new sources of reliable and stable funding. Due to the current severe national recession, which began in December 2007, "States are currently facing one of the worst, if not the worst, fiscal periods since the Great Depression" NAT'L GOVERNOR'S ASSOC. AND NAT'L ASSOC. OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES, EXECUTIVE SUMMARY (DECEMBER 2009), *available at* http://nasbo.org. "As state revenue collections historically lag behind any national economic recovery, state revenues will remain depressed throughout fiscal [year] 2010 and likely be sluggish into fiscal years 2011 and 2012." *Id.* "The weakening of state fiscal conditions is also reflected in the fact that states will have faced $256 billion in budget gaps between fiscal 2009 and fiscal 2011." *Id.*

The Respondents are admittedly national businesses, "serv[ing] 31 million households nationwide, including 500,000 in Kentucky." Resp. Br. 5. Therefore, the taxation of the Respondents and others offering like services (i.e., direct broadcast satellite

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[1] The Respondents' Brief is cited as "Resp. Br.", the petition is cited as "Pet.", and the Appendix is cited as "App.".

("DBS") services), is of great importance to the States as it represents a broad-based source of substantial revenue, much like cable and other utility services.

Section 602 admittedly does not proscribe State taxation of DBS service. Only local taxation is forbidden. However, §602(c) makes it very clear that local taxing jurisdictions may receive revenue derived "from a tax or fee imposed and collected by a State." This case provides an ideal opportunity for illuminating the line between State taxation and local taxation. It is vital that States know where the line is drawn as they endeavor to meet their budgetary challenges and to "fit[ ] [their] tax programs to local needs and usages," *Madden v. Kentucky*, 309 U.S. 83, 88 (1940), as Kentucky has done here. It is likewise very important given the current budgetary environment that this line be clarified now, so that the States can know that whatever form of taxation they adopt in this area is a *reliable* source of revenue. Allowing this issue to "percolate" for the years it would take for a legal challenge to proceed in the courts would only prolong uncertainty in an area of great importance to the States.

Other points raised by the Respondents require a response.

ARGUMENT

I. THE KENTUCKY TAX IS ENACTED BY A STATE STATUTE AND THUS FALLS UNDER THE SAVINGS CLAUSE OF SECTION 602(c).

The Respondents mischaracterized the question presented by portraying the Kentucky School Tax as one of an "array of local taxes." The reality is that it is a *State* law enacted by the Kentucky General Assembly – the body in which Sections 27 and 29 of the Kentucky Constitution vests the legislative power of the Commonwealth of Kentucky, that requires the inclusion of the gross receipts derived from the furnishing of DBS service in the School Tax base. Ky. Rev. Stat. Ann. §160.614(3) and (4). Furthermore, it is the State statutory framework likewise enacted by the Kentucky General Assembly that provides for the tax to be centrally administered and collected by the Kentucky Department of Revenue. Ky. Rev. Stat. Ann. §§160.615; 160.6154; 131.030(1) ("The Department of Revenue shall exercise all administrative functions of the state in relation to the state revenue and tax laws . . . "). Thus, this framework contains all the indicia of a tax imposed and collected by the State and has none of the vices of the local taxation that was the object of §602(a) –a myriad of local ordinances varying in their language, requiring the filing of numerous and different tax returns, subject to various filing due dates, etc.

These administrative burdens were the objective of the preemption established by §602. This objective,

as expressed by Representative Hyde, was the elimination of the undue burden of "collecting and remitting local taxes and fees" to "thousands of local taxing jurisdictions[.]" 142 Cong. Rec. H1145-06, H1158 (Feb. 1, 1996), 1996 WL 39800 (Cong. Rec.); Pet. 15-16. Representative Hyde also stressed that Congress was mindful of the principle of federalism:

> In addition, we have also amended the local tax exemption for providers of [DBS] services to make it clear that States may tax such services and rebate that money to the localities. This change balances the need to protect State sovereignty against the need to protect the direct broadcast services from the administrative nightmare that would result from subjecting them to local taxation in numerous local jurisdictions.

141 Cong. Rec. H8281-02, H8293 (Aug. 2, 1995), 1995 WL 458518 (Cong. Rec.). This mischief Congress feared is not presented by Kentucky's School Tax.

As more particularly described in the Petition on pages three through seven, the School Tax is centrally collected and administered by the Kentucky Department of Revenue. Filing a single tax return, and remitting a single tax to the State of Kentucky in compliance with Ky. Rev. Stat. Ann. §160.614 does not interfere with the congressional policy objective to eliminate the burden on DBS providers of collecting and remitting taxes to "thousands of local taxing jurisdictions." The administrative nightmare presented by the differing ordinances of local jurisdictions is not

present here. The tax imposed by Ky. Rev. Stat. Ann. §160.614 does not require DBS providers to submit a multitude of different tax returns, subject to various filing due dates, as well as varying filing places that would be necessary when taxes are imposed and collected by local jurisdictions.

Furthermore, the School Tax at issue is no more burdensome than the imposition of any other State tax upon Respondents, as allowed by §602(c). Nothing in §602 restricts a State from requiring the submission of a tax according to certain boundaries or jurisdictions. Such a request would be perfectly reasonable to provide a means for the State to determine the distribution of the revenue collected, since §602(c) permits a State to distribute revenue derived from a tax on DBS providers to local jurisdictions.

The Kentucky School Tax is no different from any other State tax enacted by the Kentucky General Assembly. The Respondents and the Kentucky Supreme Court focus on the fact that school districts could opt out of the School Tax prior to the date the enactment became effective and that school districts may choose different rates to be applied to the gross receipts subject to the tax.

There is nothing in §602 that requires the tax imposed by the State to apply uniformly throughout the State. States have diverse methods of assessment, collection, and refunding. *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209 (1946). Tax rates vary widely. *Id.* If Congress intended uniform

taxation among the States or only to spare from preemption a tax applied uniformly in each State, it would have said as much in §602(c), as it has done in other statutes. *Id.* ("Congress, had it desired complete nationwide uniformity as to tax consequences, could have stipulated for fixed payments in lieu of taxes, as it has done in other statutes.").

Furthermore, nothing in §602 requires a State-imposed tax to be uniform in its application Statewide. Nor is this a requirement under federal law. *Griffin v. County Board of Prince Edward County*, 377 U.S. 218, 231 (1964) ("A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature 'having in mind the needs and desires of each.'" (quoting *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954))).

Section 602(c) plainly allows local jurisdictions to receive revenue from a State-imposed tax. The variance of the rates and opt-out provision is simply a mechanism by which school districts (assuming they are local taxing jurisdictions) share in the revenue of the tax established by the State. Congress did not intend uniform taxation among the States, or a uniform application Statewide because it would have said as much if it did.

What Congress meant by "imposed . . . by a State" in §602(c) must be determined in conformity with the expressed legislative policy. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("'[T]he

purpose of Congress is the ultimate touchstone of pre-emption analysis.'" (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Whereas here, the federal act pertains to a subject traditionally occupied and governed by state law, "pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In light of the principle that preemption is not to be presumed and indeed strictly construed, the Kentucky Court has given §602(a) a construction that goes well beyond its narrow purpose, which certainly was not to relieve the Respondents of taxation to support the States in which they do business. To the extent the ordinary meaning of "impose" presents a latent ambiguity, the overriding federalism canon articulated in *Florida Department of Revenue v. Picadilly Cafeterias, Inc.*, 128 S.Ct. 2326 (2008) on page 2337 that "courts should proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly expressed[,]" requires §602(a)'s exemption from taxation to be construed narrowly, not the sweeping application announced by the Kentucky Supreme Court. Application of this canon to the congressional language results in a finding that "the 'savings clause' in subsection (c) in §602 contemplates a school tax scenario as prescribed in K[y.] R[ev.] S[tat.] [Ann.] 160.614(3)." App., 26. Kentucky's School Tax is imposed by the State and collected by the State and the revenue produced is shared with the school districts. Any way you look at

it, the administrative burdens that were the object of §602 are not present.

Moreover, the broad application of exemption from taxation urged upon this Court by the Respondents that would preempt Ky. Rev. Stat. Ann. §160.614 runs afoul of Congress's express recognition of the principle of federalism by interfering with Kentucky's ability to tailor its taxing laws to meet its needs. "[T]he imperative need of a State to administer its own fiscal operations," *Roswell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981), raises an important question of comity under the principles of federalism clearly contemplated by Congress when it enacted §602.

II. APPLYING KENTUCKY'S VIEW, THE SCHOOL TAX FALLS UNDER THE SAVINGS CLAUSE OF SECTION 602(c).

The Respondents' contention that a Kentucky school district is a local taxing jurisdiction, Resp. Br. i, 13, cannot be assumed since Congress did not include a school district in its definition of "local taxing jurisdiction" in §602(b). "The scope of a federal right, is of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law[,] . . . especially where a statute deals with . . . [what is] primarily a matter of state concern." *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956). The ability of a State to raise revenue through taxation is an important matter of State

concern. *See e.g. Roswell v. LaSalle National Bank*, 450 U.S. at 522.

Likewise, this Court has found that Congress intended a State-law definition of a statutory term where uniformity clearly was not intended. *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. at 209-210. In light of the express provision in §602(c) permitting taxation of any form by a State, "the assumption that Congress intends to have its law to have the same consequences throughout the nation cannot be made." *Id.* at 209. Congress clearly expressed its intent not to free DBS providers from taxation or to impose uniform tax consequences in each State by the savings clause of §602(c).

Kentucky courts agree that public education is a vital function of State government, and that a school district board of education is not a local government, but an agency of State government. *Schwindel v. Meade Co., Kentucky*, 113 S.W.3d 159, 168 (Ky. 2003). School taxes are classified as State, not local taxes. *Commonwealth v. Louisville National Bank*, 220 Ky. 89, 294 S.W.815, 817 (1927). As noted by the Kentucky Court of Appeals, "the *sole responsibility* for providing a system of common schools lies with the General Assembly." App., 20 (quoting *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 216 (Ky. 1989)). Therefore, applying Kentucky's view, the School Tax falls under the savings clause of §602(c) because it is a tax imposed and collected by the State that does not offend the federal objective of relieving

DBS providers of the administrative burdens that come with local taxation.

III. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE THAT NEEDS TO BE SETTLED NOW.

The Respondents' assertion that because twenty-nine states have enacted legislation that imposes some form of State tax on DBS providers makes this case of no importance is mistaken; rather, it signifies the opposite conclusion. Resp. Br. 1, 11. Twenty-three other States, or almost half, have yet to broaden their State taxes to include DBS providers.

Furthermore, the States' mechanisms used to fund their public schools, as more particularly described on pages twenty-three through thirty-two of the Petition, is a classic example illustrating the kind of traditional State concern that buttresses a narrow interpretation of the exemption from taxation allowed by §602(a). Kentucky has placed itself at the forefront of education reform. It matters not whether this is because Kentucky is "one of the poorest states in the nation," as the Respondents suggest, Resp. Br. 9, or instead, notwithstanding that it is poor. Kentucky's efforts to strengthen its education funding system by making it more balanced, stable, efficient, and fair is tailored to foster "the vital element of local participation" that this Court and every other State recognizes is not only vital for continued public

support of schools, but also of overriding importance from an educational standpoint. Pet. 24-26.

The Kentucky Supreme Court's Opinion creates uncertainty as to the limitations Congress has placed upon the States' taxing powers at a time of an historical economic recession when States cannot afford to wait on the lengthy process required when a law is challenged. Therefore this question of national importance needs to be settled now.

CONCLUSION

For the foregoing reasons and those stated previously, the petition for writ of certiorari should be granted.

Respectfully submitted,

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